STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v-

CLEVELAND WAYNE WILLIAMS,
Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 239662

Circuit Court No. 01-7419-01

Wayne CRI

G. Corbett III

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
LEONARD ZIELINSKI (P58155)
Attorney for Defendant-Appellant
State Appellate Defender Office
101 North Washington
14th Floor
Lansing, MI 48913

126956

9/28

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Cleveland Wayne Williams applies for leave to appeal the July 9, 2004 decision of the Court of Appeals dismissing the appeal and remanding to the trial court for a new trial. Defendant-Appellant also applies for leave to appeal the October 3, 2003 Order of the trial court denying Mr. Williams Motion for 180 day rule.

Defendant-Appellant submits that the Court of Appeals erred in dismissing the appeal after the trial court erred on remand by denying Defendant's motion to dismiss for violation of the 180 day rule and defendant's constitutional right to a speedy trial where the trial delay exceeded 19 months, the prosecutor knew Mr. Williams was incarcerated with the department of corrections and was on oral notice at least five months prior to the motion hearing that Mr. Williams had asserted his right to a speedy trial. The trial court also erred in denying the motion where even though Mr. Williams was on parole at the time of the instant alleged offense his

sentencing was delayed over 19 months resulting in the same prejudice as if the resulting sentence was concurrent.

The trial court also erred in relying upon People v Chavies, 234 Mich App 274; 593 NW2d 655 (1999) in holding that there was no violation of the 180 day rule where Chavies was wrongly decided because neither the statute nor the court rule exempt consecutive sentences, the purpose of the statutory 180-day rule protects not only a defendant's right to serve concurrent sentences, but also to secure the constitutional right to a speedy trial, and the prejudice to a defendant on parole as a result of a delay in trial and sentencing is the same for consecutive as it is for concurrent sentences.

The trial court again erred in finding that Mr. Williams was not denied his constitutional right to a speedy trial where Mr. Williams was arrested on May 23, 2000 and placed in the custody of the Michigan Department of Corrections and a warrant issued June 2, 2000 but no efforts were made to do anything while Mr. Williams languished in prison for over a year until on June 19, 2001 he was arraigned on the warrant and a preliminary examination was held on June 28th, 2001, but he was still not taken to trial until January 9, 2002, over 19 months after the original warrant issued.

Finally, the trial court erred in finding that Mr. Williams waived his right to a speedy trial. Mr. Williams did not waive his constitutional right to a speedy trial by simply agreeing at the final conference to the date set for trial.

Mr. Williams submits that the errors of the trial court and the Court of Appeals are clearly erroneous and constitute a material injustice under MCR 7.302(B)(5) and he asks this Court to either grant leave to appeal, remand to the Court of Appeals for review as on leave granted, or to grant further relief as this Court deems appropriate.

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

CLEVELAND WAYNE WILLIAMS,

Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 239662

Circuit Court No. 01-7419-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
LEONARD ZIELINSKI (P58155)
Attorney for Defendant-Appellant

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: LEONARD ZIELINSKI (P58155)
Assistant Defender
State Appellate Defender Office
101 North Washington
14th Floor
Lansing, MI 48913

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

STATEMENT OF JURISDICTION

The charge of armed robbery was dismissed against Defendant-Appellant by Order dated January 9, 2002. A Claim of Appeal was filed by the prosecutor on February 14, 2002. The Court of Appeals had jurisdiction of the appeal of right pursuant to MCL 600.308(1), MCL 770.12(1)(a) and MCR 7.203(E). The Court of Appeals remanded the case back to the trial court for a hearing on Defendant's original motion to dismiss and the Court of Appeals retained jurisdiction. After the trial court issued an order denying Defendant's motion to dismiss on remand, the Court of Appeals issued an order on its own motion dismissing the appeal. This Court has jurisdiction to consider this application for leave to appeal pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT NOT ERR WHEN IT DENIED MR. WILLIAMS' MOTION FOR VIOLATION OF THE RIGHT TO A SPEEDY TRIAL WHERE THE DELAY EXCEEDED 19 MONTHS, THE PROSECUTOR KNEW MR. WILLIAMS WAS INCARCERATED WITH THE DEPARTMENT OF CORRECTIONS AND WAS ON ORAL NOTICE AT LEAST FIVE MONTHS PRIOR TO THE MOTION HEARING THAT MR. WILLIAMS HAD ASSERTED HIS RIGHT TO A SPEEDY TRIAL, AND EVEN THOUGH HE WAS ON PAROLE AT THE TIME OF THE INSTANT ALLEGED OFFENSE WAS HIS SENTENCING DELAYED OVER 19 MONTHS RESULTING IN THE SAME PREJUDICE AS IF THE RESULTING SENTENCE WAS CONCURRENT?

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

Plaintiff-Appellee answered, "No".

Court of Appeals answered, "No".

STATEMENT OF FACTS

Defendant-Appellee Cleveland Wayne Williams was charged with armed robbery, MCL 750.529; MSA 28.797. According to the record, the robbery occurred on May 7, 2000. On May 23, 2000, Mr. Williams was placed in the custody of the Michigan Department of Corrections. On May 26, 2000, the prosecutor's office recommended a warrant for armed robbery. On June 2, 2000, the magistrate signed an arrest warrant.

Over a year later, on June 28, 2001, a preliminary examination was conducted and Mr. Williams was bound over to circuit court. On July 19, 2001, Defendant was arraigned on the Information. During a Calendar Conference held on August 10, 2001, defense counsel put on the record that Mr. Williams declined a plea offer and that he "would like to put the People on notice as well as the Court that I would like to file a 180 Day Rule motion. I will do that in accordance with the Court Rules and present that on a timely basis to the prosecution and have discovery, and I don't know if you want to set that now in anticipation of that or just wait until I present the motion." The court responded that "it's generally on the basis of written documents, Counsel." (Calendar Conference held August 10, 2001 at 3). At the same conference the following colloquy occurred between Defendant and the court:

> THE COURT: Defendant, what is your name, sir?
>
> THE DEFENDANT: Cleveland Williams, sir.
>
> THE COURT: You appear to be dressed in Department of Corrections clothing, is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you under sentence?
>
> THE DEFENDANT: Sir?

THE COURT: Are you under sentencing for something?

THE DEFENDANT: Sir, my sentence was, my sentence was completed May 31st of this year.

THE COURT: What were you under sentence for?

THE DEFENDANT: I was under sentence for larceny from a person.

THE COURT: Where did you come to, which building?

THE DEFENDANT: I came to this building from Clinton Street, the old jail.

THE COURT: Why are you still dressed in prisoner clothes?

THE DEFENDANT: I was paroled to the detainer, the detainer being the charges pending at this time. I am on currently parole status, but not to be released until deciding, until these matters have been addressed.

THE COURT: There's a hold on you for this, these charges?

THE DEFENDANT: Yes, Judge. (Id. at 4-5).

At the Final Conference the court asked Mr. Williams how much time he had left to serve on his current sentence, to which he replied: "The current sentence I have finished at this moment. I have just as of recently received a 12 months continuous [sic] due to the fact of this proceeding. It was, the Department of Corrections was notified that I had been bound over on this particular charge, and therefore, they rescinded the parole they had given me and granted a 12 month continuance as a result. . . . If I recall, July of next year [is my earliest out date]. July 27th, I believe." (Final Conference held October 12, 2001 at 3).

It was also part of the record that Mr. Williams had just been assigned substitute counsel because, according to Mr. Williams, the court "fired" the attorney "because the lawyer didn't show up." (Id. at 4). The court also set a trial date of January 9th, to which all parties agreed. (Id. at 5).

On January 9, 2001, the day scheduled for trial, a motion hearing was held. Judge Crockett called the case: "This is file number 017418, the People of the State of Michigan versus Cleveland Williams, charged in a Criminal Information with the offense of robbery armed. The Court has before it a motion to dismiss for violation of the Defendant's right to a speedy trial. Are both sides ready?" (Motion held January 9, 2002 at 2). It was established that the robbery occurred on May 7, 2000 while Mr. Williams was on parole, and the magistrate signed and issued a Warrant on June 2, 2000. Defendant informed the court that on May 23, 2000, his parole officer violated him as a result of the robbery charge and he was sent to prison. It was argued that the 180 days for the purpose of a 180-day motion begins at the point when the Department of Corrections knows or should have known of the defendant's incarceration or when the prosecution knows or should have known about an outstanding untried warrant against an inmate. (Id. at 3-6).

The prosecution acknowledged that "institution of charges" began "as early as June 2nd when the computer indicates the warrant was signed by a magistrate." (Id. at 6). The prosecutor argued that, pursuant to People v Chavies,[1] the 180 rule does not apply to Mr. Williams because he was on parole at the time of the instant offense and the "rule is inapplicable to crimes committed by parolees given the mandatory consecutive sentence for crimes committed by parolee." (Motion held January 9, 2002 at 12). He also stated that the motion should be denied because the seven-day notice requirement was violated, arguing that Mr. Williams brought the motion the day of trial and he did not have adequate notice. (Id. at 13, 22).

---

[1] 234 Mich App 274; 593 NW2d 655 (1999). The prosecution inaccurately cited Chavies in its brief as a Michigan Supreme Court decision. It is a Michigan Court of Appeals decision.

In response, the court determined that Mr. Williams had been in the custody of the Department of Corrections since approximately May 23, 2000. "A warrant issued in this case on June 2nd, 2000. A preliminary examination was not conducted until on or about June 28th of 2001, wherein Mr. Williams was bound over for trial." (Id. at 8-9). The court also found that "on or after June 2nd when this warrant issues the statute start[ed] running." The court stated:

> No efforts that I know of were made to do anything beyond obtaining a warrant until on or about June 19th of 2001 when Mr. Williams was arraigned on the warrant. Then he had a preliminary examination on June 28th, 2001. As I view the matter, at least at the time of the preliminary examination, some questions should have been raised as to whether or not there was a violation of his right to a speedy trial at that time. That was more than a year after the warrant issued. And his whereabouts were or should have been known to the Prosecution. He's in prison. He's not hiding on the street somewhere, in another state, as an absconder or out of the country. He's right here in the custody of the State. What excuse is there for not bringing this matter to fruition at an earlier date? What efforts have been made to do so? (Id. at 11-12).

Following further argument, the court stated:

> In sole. There is a 6th Amendment to the United States Constitution which reads: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, among other things. Now, that is basically what is at issue here, whether or not his constitutional right to a speedy trial has been violated. Statutes pursuant to and not inconsistent with that amendment are fine. And their purposes may be more specific or even different, so long as they are not in conflict with the Constitution. Michigan's Constitution has a similar provision.
>
> I think Mr. Williams' constitutional right to a speedy trial has not been afforded him. (Id. at 17).

At one point the prosecutor agreed that the lengthy delay was "inexcusable." (Id. at 19). And when the prosecutor stated that he did not think the delay was beyond eighteen months, the court replied: "That then makes it presumptively violate, a presumptive violation which then shifts the burden to you to prove that you have made all reasonable efforts. But certainly 18 months have transpired since June 2, 2000." (Id. at 19-20).

The motion was granted and the charges against Mr. Williams were dismissed. (Id. at 21-23; see Order of January 9, 2002).

The prosecutor appealed and on September 5, 2002, filed a brief on appeal. Defendant-Appellee Williams filed a response to the prosecutor's brief on or about December 3, 2002.

On May 28, 2003, the prosecutor filed a Motion for Immediate Consideration and Motion for Peremptory Reversal. On June 3, 2003, Defendant-Appellee filed his Answer to Plaintiff-Appellant's Motion for Peremptory Reversal.

In response to the prosecutor's Motion for Immediate Consideration and Motion for Peremptory Reversal the Court of Appeals issued an order vacating the trial court's earlier ruling on the basis that the prosecutor had insufficient notice of the earlier hearing and remanding the case back to the trial court for review of the 180-day issue in light of *People v Chavies*, 234 Mich App 274 (2000) and to review the issue of the constitutional right to a speedy trial:

> The Court further orders, pursuant to MCR 7.216(7), that the order of January 9, 2002 is vacated, and the matter is remanded for further proceedings and reconsideration in light of those proceedings. The court shall conduct another hearing, the prosecutor having had insufficient notice of the previous hearing, and, in rendering its decision shall 1) specifically address the application of *People v Chavies*, 234 Mich 274 (2000) to the 180-day issue, and 2) make finding regarding and discuss the application of the factors identified as relevant to the constitutional speedy trial issue. Barker v Wingo, 407 US 514 (1972); People v Grimmett, 388 Mich 590 (1972). (Court of Appeals Amended Order, June 9, 2003).

The trial court (Judge Edward Ewell Jr. had replaced Judge George W. Crockett, III, the original trial judge) held a hearing on October 3, 2003 and denied Mr. Williams motion to dismiss. The trial court ruled as follows:

> The defendant was on parole when this crime was committed, and the Court noted that he was returned to the Department of correction on May 23, 2000, and about a week before the charges were filed.

The court records disclose that a magistrate signed a warrant in this matter on June 2nd, 2000, and defendant was bound over for trial on June 28th, 2000.

Initially a final pretrial conference occurred less than four months after the bind over, and about 16 months after issuance of the arrest warrant. At final conference the defendant without objection agreed to a trial date.

In looking at all of the factors in this case, first going to the 180 day, it is the opinion of this Court that 180 day rule does not apply to the facts of this case because the defendant was facing consecutive, not concurrent sentencing. That's I'm looking at People versus Chavies.

And I believe the Judge Murray from the Court of Appeals indicated that as to the 180 day rule issue, remand is not necessary since Chavies clearly applies to this case and precludes relief to the defendant. The only way that this Court could find in defendant's favor would be to overrule that case, and I'm not prepared to do that.

I think that when a defendant commits a crime while on parole, the goal of concurrent sentence is impossible since a parolee committing a crime must receive a consecutive sentence.

Thus, since the goal of fostering concurrent sentences does not apply in a case where a mandatory consecutive sentence is required -- I'll slow down -- that the Court held that 180 day rule did not apply to crime committed by the parolees.

So in this case since the Court believes that Chavies does not apply to the facts, and the Court's not prepared to overrule or take a different line of reasoning in the case, the appellees -- appellant motion to reinstate the case is I will say granted.

* * *

As to the second issue, and this is one I think that's more -- that I do think that thee are, I don't necessarily say closer case, but I do think that in terms of reasoning it's a little more closer issue.

I think that the parties have stated the correct legal standard, and that's under Wingo, People versus Wingo -- Barker versus Wingo decision that the Court looks at the length of delay, the reasons for the delay, whether the defendant has asserted his or her rights to speedy trial, and found that the defendant has been prejudiced by the delay.

It is the Court finds that it is not a 18 or more month delay based upon the several continuances that were caused by defense counsel.

In addition, the Court find, agrees with the People that basically it was no more than a 12 month delay from the time of warrant and arraignment and the time that he was violated. Given that the burden does not shift from the defendant to the prosecution.

In looking at the other, in looking at the reason for delay, the Court finds that the People did not have actual notice, and that some of that was attributed to the defendant.

In looking at whether the defendant asserted his or her rights to speedy trial, the Court finds that the defendant did knowingly waive his right; that he was familiar with the criminal justice system; that his letter shows that he knew about the speedy trial. And the fact that the People were not only given a day's notice of it, I think also weighs in the People's favor.

And in terms of looking at the reasons for the delay the Court also looked at the fact that the letter that I asked about was not dated or signed, it also indicates that the defendant knew about his rights; that he knowingly waived them at the time of trial. And therefore some support for that, defendant who agrees to trial date waives any claims that it does not come soon enough, and you can see People versus Jones, which is 192 Mich App 737.

I asked counsel to talk about any prejudice. And basically the defendant indicated that the prejudice was the delay in itself.

The Court has not found any reasonable basis to show how defendant has been prejudiced, whether it be the concurrent versus consecutive sentence or any problem in terms of finding or locating witnesses or preparing for defense.

And in fact the Court believes that delay has had -- the People suffer a prejudice in terms of presenting its case in terms or witness' memory since they have the burden, too, of proving the case.

So I don't believe that the parole violation in and of itself given the length of time and the length of the -- strike that.

I don't believe that the length of time in and of itself can be cured at sentencing.

Given all the factors in this case, the Court believes that the factor under Wingo did not justify a speedy trial constitutional violation. (MT 50-54).

The Court of Appeals order remanding the case to the trial court stated that the Court of Appeals would retain jurisdiction after the trial court issued an order on remand. However, the Court of Appeals on July 9, 2004 issued an order on its own motion dismissing the appeal and remanding the case to the trial court for trial. This application follows.

I. THE TRIAL COURT ERRED WHEN IT DENIED MR. WILLIAMS' MOTION FOR VIOLATION OF THE RIGHT TO A SPEEDY TRIAL WHERE THE DELAY EXCEEDED 19 MONTHS, THE PROSECUTOR KNEW MR. WILLIAMS WAS INCARCERATED WITH THE DEPARTMENT OF CORRECTIONS AND WAS ON ORAL NOTICE AT LEAST FIVE MONTHS PRIOR TO THE MOTION HEARING THAT MR. WILLIAMS HAD ASSERTED HIS RIGHT TO A SPEEDY TRIAL, AND EVEN THOUGH HE WAS ON PAROLE AT THE TIME OF THE INSTANT ALLEGED OFFENSE HIS SENTENCING WAS DELAYED OVER 19 MONTHS RESULTING IN THE SAME PREJUDICE AS IF THE RESULTING SENTENCE WAS CONCURRENT.

STANDARD OF REVIEW: This Court applies the *de novo* standard of review to issues calling for construction of constitutional provisions, statutes, and court rules, such as the right to a speedy trial. People v Hill, 402 Mich 272, 282-283; 262 NW2d 641 (1978); People v Metzler, 193 Mich App 541, 545-546; 484 NW2d 695 (1992).

Defendant Williams was arrested and incarcerated in the Department of Corrections on the instant charged offense on May 23, 2000. A warrant was signed and issued on June 2, 2000. It was not until over a year later, on June 28, 2001 that a preliminary examination was conducted and Mr. Williams was bound over for trial. It was over six months later, January 9, 2002, that trial was scheduled to begin. On January 8, 2002, Mr. Williams filed a Motion To Dismiss For Violation Of Defendant's Constitutional Right To Speedy Trial, Or In The Alternative, For Lack Of Jurisdiction Based On A Violation Of The 180 Day Rule Pursuant To MCR 6.004. On January 9, 2002, a Motion Hearing was held where Judge Crockett granted the motion and dismissed the charges. (See Motion held January 9, 2002 at 21-23; Order of January 9, 2002).

Judge Crockett held:

> There is a 6th Amendment to the United States Constitution which reads: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, among other things. Now, that is basically what is at issue here, whether or not his constitutional right to a speedy trial has been violated. Statutes pursuant to and not inconsistent with that amendment are fine. And their

purposes may be more specific or even different, so long as they are not in conflict with the Constitution. Michigan's Constitution has a similar provision.

I think Mr. Williams' constitutional right to a speedy trial has not been afforded him. (Motion held January 9, 2002 at 17).

Earlier the judge found that Mr. Williams' right to a speedy trial began when the warrant issued on June 2, 2000. He then observed:

> No efforts that I know of were made to do anything beyond obtaining a warrant until on or about June 19th of 2001 when Mr. Williams was arraigned on the warrant. Then he had a preliminary examination on June 28th, 2001. As I view the matter, at least at the time of the preliminary examination, some questions should have been raised as to whether or not there was a violation of his right to a speedy trial at that time. That was more than a year after the warrant issued. And his whereabouts were or should have been known to the Prosecution. He's in prison. He's not hiding on the street somewhere, in another state, as an absconder or out of the country. He's right here in the custody of the State. What excuse is there for not bringing this matter to fruition at an earlier date? What efforts have been made to do so? (Id. at 11-12).

Later, the prosecutor agreed with Judge Crockett that the lengthy delay was "inexcusable." (Id. at 19). Although Judge Crockett's order granting Mr. William's motion was vacated by the Court of Appeals and that the trial court issued a new order denying Mr. Williams' motion, the fact that the prosecutor agreed that the lengthy delay was inexcusable goes to the heart of the facts of this matter and Mr. Williams is in agreement with Judge Crockett's statement that at least as of the time of the preliminary examination there should have been a question raised as to a violation of Mr. Williams right to a speedy trial.

A. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO DISMISS WHERE THE PROSECUTION WAS ON NOTICE OF DEFENDANT'S ARREST AND INCARCERATION AND ORAL NOTICE ASSERTING THE RIGHT TO A SPEEDY TRIAL WAS GIVEN ON AUGUST 10, 2001.

It was error for the trial court to deny Defendant's motion to dismiss the charges due to lack of notice. At the October 3, 2003 hearing the trial court made the following findings with regard to the issue of notice:

> The defendant was on parole when this crime was committed, and the Court noted that he was returned to the Department of correction on May 23, 2000, and about a week before the charges were filed.
>
> The court records disclose that a magistrate signed a warrant in this matter on June 2nd, 2000, and defendant was bound over for trial on June 28th, 2000.
>
> Initially a final pretrial conference occurred less than four months after the bind over, and about 16 months after issuance of the arrest warrant.
>
> . . .
>
> It is the Court finds that it is not a [sic]18 or more month delay based upon the several continuances that were caused by defense counsel.
>
> In addition, the Court find, [sic] agrees with the People that basically it was no more than a 12 month delay from the time of warrant and arraignment and the time that he was violated. Given that the burden does not shift from the defendant to the prosecution.
>
> In looking at the other, in looking at the reason for delay, the Court finds that the People did not have actual notice, and that some of that was attributed to the defendant.
>
> . . .
>
> And in terms of looking at the reasons for the delay the Court also looked at the fact that the letter that I asked about was not dated or signed . . . . [October 3, 2003 motion hearing at 50, 52-53]

The record was clear regarding the timing of the events. Mr. Williams was arrested and incarcerated on May 23, 2000, a warrant was issued on June 2, 2000, and, contrary to the trial court's finding, it was not until over a year later, June 28, 2001, that a preliminary examination was conducted and Mr. Williams was bound over for trial, and over six months later, January 9, 2002, that trial was scheduled to begin. Over 18 months had passed between Defendant's arrest

and his trial date. The prosecution was on notice at least as of the time of the preliminary examination when some questions should have been raised as to whether there was a violation of his right to a speedy trial at that time. Mr. Williams had been incarcerated for over a year and no efforts were made to do anything beyond obtaining a warrant. At the hearing on remand, the trial court stated that: "the Court find, [sic] agrees with the People that basically it was no more than a 12 month delay from the time of warrant and arraignment and the time that he was violated. Given that the burden does not shift from the defendant to the prosecution." However, what is at issue is the time between the arrest and trial, not between a warrant and the time that Mr. Williams "was violated." *See* US v Marion, 404 US 307, 321; 92 S Ct 455; 30 L Ed 2d 468 (1971) ("Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend that reach of the amendment to the period prior to arrest.")

Second, the Court stated at the October 3, 2003 hearing that: "the fact that the People were not only [sic] given a day's notice of it [motion for dismissal under the 180 day rule and for violation of right to speedy trial] I think also weighs in the people's favor." (October 3, 2003 hearing at 52-53). However, during a Calendar Conference held on August 10, 2001, defense counsel put on the record that Mr. Williams declined a plea offer and that he "would like to put the People on notice as well as the Court that I would like to file a 180 Day Rule motion. I will do that in accordance with the Court Rules and present that on a timely basis to the prosecution and have discovery, and I don't know if you want to set that now in anticipation of that or just wait until I present the motion." The court responded that "it's generally on the basis of written documents, Counsel." (Calendar Conference held August 10, 2001 at 3). Five months in

advance of the motion hearing, the prosecution was put on oral notice that Defendant would file a 180-day rule motion.

Mr. Williams also told previous appellate counsel during an attorney-client visit that he wrote Judge Crockett a letter approximately three weeks prior to the January 9th motion hearing addressing the speedy trial issue. In the letter he reminded the court that a verbal motion had been made during the August 10, 2001 hearing, but that his then assigned attorney "failed to represent Defendant on said motion and the case as a whole, resulting in the motion not being heard at all." Mr. Williams wrote: "Again Your Honor, My plea is that if my motion had been heard and I'm asking that it be heard and yes, it is on record (verbally) and in lew [sic] of all the months (18) the law states that 'Jurisdiction has been lost.'" (See Letter Attached as Appendix A). The trial court at the remand hearing noted that the letter "was not dated or signed," but otherwise made no factual finding with regard to the date of receipt of the letter.

B. THE TRIAL COURT ERRED IN RELYING UPON THE CASE OF PEOPLE V CHAVIES, 234 MICH APP 274; 593 NW2D 655 (1999) TO DENY MR. WILLIAMS' MOTION WHERE THE STATUTE AND THE COURT RULE GUARANTEEING A RIGHT TO A SPEEDY TRIAL WITHIN 180 DAYS APPLY TO MR. WILLIAMS, WHERE CHAVIES WAS WRONGLY DECIDED BECAUSE NEITHER THE STATUTE NOR THE COURT RULE EXEMPT CONSECUTIVE SENTENCES, THE PURPOSE OF THE STATUTORY 180-DAY RULE PROTECTS NOT ONLY A DEFENDANT'S RIGHT TO SERVE CONCURRENT SENTENCES, BUT ALSO TO SECURE THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL, AND THE PREJUDICE TO A DEFENDANT ON PAROLE AS A RESULT OF A DELAY IN TRIAL AND SENTENCING IS THE SAME FOR CONSECUTIVE AS IT IS FOR CONCURRENT SENTENCES.

At the remand hearing the trial court found that Mr. Williams motion as brought under the 180 day rule must be denied on the basis of the Michigan Court of Appeals case of People v Chavies, 234 Mich App 274; 593 NW2d 655 (1999):

In looking at all of the factors in this case, first going to the 180 day, it is the opinion of this Court that 180 day rule does not apply to the facts of this case because the defendant was facing consecutive, not concurrent sentencing. That's I'm looking at People versus Chavies.

And I believe the Judge Murray from the Court of Appeals indicated that as to the 180 day rule issue, remand is not necessary since Chavies clearly applies to this case and precludes relief to the defendant. The only way that this Court could find in defendant's favor would be to overrule that case, and I'm not prepared to do that.

I think that when a defendant commits a crime while on parole, the goal of concurrent sentence is impossible since a parolee committing a crime must receive a consecutive sentence.

Thus, since the goal of fostering concurrent sentences does not apply in a case where a mandatory consecutive sentence is required -- I'll slow down -- that the Court held that 180 day rule did not apply to crime committed by the parolees.

So in this case since the Court believes that Chavies does not apply to the facts, and the Court's not prepared to overrule or take a different line of reasoning in the case, the appellees -- appellant motion to reinstate the case is I will say granted. [October 3, 2003 hearing at 50-51).

Mr. Williams submits however, that the Chavies case was wrongly decided and should be overturned by this Court.

Both the United States and the Michigan Constitution guarantee every criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. That right is also recognized by statute and court rule. MCL 768.1 provides:

> The people of this state and persons charged with crimes are entitled to and shall have a speedy trial and determination of all prosecutions and it is hereby made the duty of all public officers having duties to perform in any criminal case, to bring such case to a final determination without delay except as may be necessary to secure to the accused a fair and impartial trial. MCL 768.1; MSA 28.1024.

MCL 780.131 further provides:

> Untried warrants, indictments, informations, or complaints against correctional facility inmates; request for disposition, statement; application of section

Sec. 1. (1) Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

* * *

(2) This section does not apply to a warrant, indictment, information, or complaint arising from either of the following:

(a) A criminal offense committed by an inmate of a state correctional facility while incarcerated in the correctional facility.

(b) A criminal offense committed by an inmate of a state correctional facility after the inmate has escaped from the correctional facility and before he or she has been returned to the custody of the department of corrections.

Michigan Court Rule 6.004 provides:

(A) Right to Speedy Trial. The defendant and the people are entitled to a speedy trial and to a speedy resolution of all matters before the court.

(D) Untried Charges Against State Prisoner.

(1) The 180-Day Rule. Except for crimes exempted by MCL 780.131(2); MSA 28.969(1)(2), the prosecutor must make a good faith effort to bring a criminal charge to trial within 180 days of either of the following:

(a) the time from which the prosecutor knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison, or

(b) the time from which the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison.

For purposes of this subrule, a person is charged with a criminal offense if a warrant, complaint, or indictment has been issued against the person.

> (2) Remedy. In cases covered by subrule (1)(a), the defendant is entitled to have the charge dismissed with prejudice if the prosecutor fails to make a good faith effort to bring the charge to trial within the 180-day period. When, in cases covered by subrule (1)(b), the prosecutor's failure to bring the charge to trial is attributable to lack of notice from the Department of Corrections, the defendant is entitled to sentence credit for the period of delay. Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice.

Defendant Williams brought his motion before the trial court pursuant to both his constitutional and statutory rights to a speedy trial. The trial court held that the statute and court rule relied upon by the trial court when it granted Defendant's motion do not apply to Mr. Williams because he was on parole at the time of the instant offense. It is true that Mr. Williams was on parole at the time of the offense of which he was charged. It is also true, as the prosecutor argues, that the Court of Appeals stated in its recent opinion in People v Chavies, 234 Mich App 274; 593 NW2d 655 (1999), that "the purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently." Id. at 280. And it is also true that the Chavies court held that based on that rationale the rule "does not apply in a case where a mandatory consecutive sentence is required upon conviction." Id. However, the Court of Appeals decision in Chavies was wrongly decided.

First, there is no language in the statutes or court rules that exempts inmates serving consecutive sentences. There is no mention of either consecutive or concurrent sentences. While the statute exempts specific inmates, those who commit an offense while incarcerated or while on escape status, there is no exception for those inmates who are on parole and would therefore face consecutive sentences. The Chavies court cites only People v Von Everett, 156 Mich App 615, 618-619; 402 NW2d 773 (1986), to support the proposition that the rule does not apply to an incarcerated parolee unless and until parole is revoked. But in that case, the rationale

was that the prisoner did not meet the statutory definition of "awaiting incarceration in a state prison nor an inmate of a penal institution." Id. There is no justification based on the language of the statute to hold that the 180-day rule does not apply to consecutive sentences.

The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. People v Babcock, 244 Mich App 64; 624 NW2d 479 (2000); People v Borchard-Ruhland, 460 Mich 278, 284; 597 NW2d 1 (1999). To determine the legislature's intent, courts must first look to the specific language of the statute. Id. If the plain and ordinary meaning of the statute is clear, judicial construction is not permitted. Id. A court may not exceed the words of the statute to determine the legislature's intent unless the statutory language is ambiguous. Id. at 284-285.

Second, the Court of Appeals in Chavies states that the "purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently." Chavies, 234 Mich App at 280, citing People v Bell, 209 Mich App 273, 279; 530 NW2d 167 (1995); People v McCullum, 201 Mich App 463, 465; 507 NW2d 3 (1993). But our Supreme Court has recognized that the 180-day rule protects more than just a defendant's right to serve concurrent sentences. In People v Hill, 402 Mich 272; 262 NW2d 641 (1978), the Supreme Court found that the purpose of the 180-day rule was to secure to state prison inmates their constitutional right to a speedy trial. Id. at 280. And the United States Supreme Court has noted that the right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment." Klopfer v North Carolina, 386 US 213; 87 S Ct 988; 18 L Ed 2d 1 (1967). The right "has its roots at the very foundation of our English law heritage," and can be traced back to the twelfth century and the Magna Carta. Id. In Smith v Hooey, 393 US 374; 89 S Ct 575; 21 L

Ed 2d 607 (1969), the Supreme Court identified the interests involved. The constitutional right to a speedy trial

> has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American system: "[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself." Id. quoting United States v Ewell, 383 US 116; 86 S Ct 773; 15 L Ed 2d 627 (1966).

Arrest and incarceration may seriously interfere with liberty and disrupt employment, drain financial resources, curtail associations, subject the accused to public obloquy, and create anxiety in him, his family, and his friends. Moreover, incarceration hinders the ability to gather evidence, contact witnesses, and otherwise prepare a defense. See US v Marion, 404 US 307; 92 S Ct 455; 30 L Ed 2d 468 (1971). The "inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice when defense witnesses are unable to recall accurately events of the distant past." Barker v Wingo, 407 US 514; 92 S Ct 2182; 33 L Ed 2d (1972). Further, criminal charges and incarceration subject the defendant to public scorn, deprivation of employment, and chilled exercise of First Amendment rights.

The right of an accused to a speedy trial does not depend upon whether the charged offense was committed prior to or during incarceration for another crime. Therefore, Defendant asserts that Chavies was wrongly decided and that persons such as he who are charged with crime while on parole are entitled to the protection of the 180-day rule. See Hill, 402 Mich 272; cf Hooey, 393 US 374; Barker, 407 US 514; People v Woodruff, 105 Mich App 155; 306 NW2d 432 (1981); People v Pitsaroff, 102 Mich App 226; 301 NW2d 858 (1980); People v Anglin, 102 Mich App 118; 301 NW2d 470 (1980).

Finally, there is a practical reason why Chavies was wrongly decided. It is a fallacy that there is no prejudice to the defendant whose trial is delayed because he is serving consecutive instead of concurrent sentences. The rationale is that because the accused is serving consecutive sentences, it does not matter when he is tried because he must finish his current sentence before the new sentence starts. While that may be true with some consecutive sentences, for instance where an individual is sentenced to two three-year consecutive sentences he must wait until the first three-year term is served before beginning his next three-year term, it is not true for a consecutive sentence that is imposed while a person is on parole. The critical difference is that instead of waiting for the first sentence to expire, the paroled term, the new term actually begins at the time of sentencing. As a result, when the trial is delayed, the sentence is likewise delayed and therefore the length of time served on the sentences is increased by the amount of the delay in the sentence. Where the penalty for committing a crime while on parole is a new sentence to run consecutive to the paroled sentence, because the sentence begins on the new sentence at the time of sentencing and not when the old sentence expires, any delay in trial results in the same prejudice found where the sentences are concurrent. The prejudice to Mr. Williams in the instant case is the same as it is if he were serving concurrent sentences. The result in Chavies is wrong and should not be applied to this case.

Where the purpose of the statutory 180-day rule is to not only protect a defendant's right to serve concurrent sentences, but to also secure to state prison inmates their constitutional right to a speedy trial, and where the prejudice to a defendant as a result of a delay in trial and sentencing is the same for consecutive as it is for concurrent sentences, the trial court's decision to deny the motion to dismiss the charges was incorrect and this Court should overrule Chavies and remand to the trial court for dismissal of the charges.

C. THE TRIAL COURT'S DECISION DENYING DEFENDANT'S MOTION WAS IN ERROR AND SHOULD BE REVERSED ON APPEAL BECAUSE MR. WILLIAMS WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WHERE HE WAS ARRESTED ON MAY 23, 2000 AND PLACED IN THE CUSTODY OF THE MICHIGAN DEPARTMENT OF CORRECTIONS AND A WARRANT ISSUED JUNE 2, 2000 BUT NO EFFORTS WERE MADE TO DO ANYTHING WHILE MR. WILLIAMS LANGUISHED IN PRISON FOR OVER A YEAR UNTIL ON JUNE 19, 2001 HE WAS ARRAIGNED ON THE WARRANT AND A PRELIMINARY EXAMINATION WAS HELD ON JUNE 28TH, 2001, BUT HE WAS STILL NOT TAKEN TO TRIAL UNTIL JANUARY 9, 2002, OVER 19 MONTHS AFTER THE ORIGINAL WARRANT ISSUED.

Defendant Williams filed a Motion To Dismiss For Violation Of Defendant's Constitutional Right To Speedy Trial, Or In The Alternative, For Lack Of Jurisdiction Based On A Violation Of The 180 Day Rule Pursuant To MCR 6.004. Defendant therefore brought his motion on the basis of not only his state statutory right to a speedy trial, but also on the ground of his state and federal constitutional right to a speedy trial.

The United States and the Michigan Constitution guarantee every criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. That right is also recognized by statute and court rule.

The trial court erred when it denied Mr. Williams's motion to dismiss for violation of the constitutionally guaranteed right to a speedy trial. US Const, Ams V, VI, XIV; Const 1963, art 1, §§ 2, 17, 20.

The United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial . . . . US Const; Am VI.

The Michigan Constitution similarly provides:

> In every criminal prosecution, the accused shall have the right to a speedy and public trial . . . . Const 1963, art 1, § 20.

In Barker v Wingo, 407 US 514; 92 S Ct 2182; 33 L Ed 2d (1972), the United States Supreme Court promulgated a four-part test to assess claimed speedy trial violations. The factors to be weighed include: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of the right by making a demand for a speedy trial; and (4) prejudice to the defendant. Id. at 530. The Michigan Supreme Court adopted this test in People v Grimmett, 388 Mich 590; 202 NW2d 278 (1972) and People v Collins, 388 Mich 680; 202 NW2d 769 (1972).

The length of delay is the triggering mechanism for consideration of other factors in a speedy trial analysis, but it is not in itself determinative. See People v Missouri, 100 Mich App 310; 299 NW2d 346 (1980); People v Harris, 110 Mich App 636; 313 NW2d 636 (1981). Unexplained delays are charged against the prosecution. See People v Bennett, 84 Mich App 408 (1978); People v Davis (After Remand), 129 Mich App 622; 341 NW2d 776 (1983). Also, normal docket congestion is charged against the prosecution. See People v Jones, 121 Mich App 484; 328 NW2d 676 (1982).

At the October 3, 2003 hearing the trial court held as follows with regard to Mr. Williams' constitutional right to a speedy trial:

> As to the second issue, and this is one I think that's more -- that I do think that thee are, I don't necessarily say closer case, but I do think that in terms of reasoning it's a little more closer issue.
>
> I think that the parties have stated the correct legal standard, and that's under Wingo, People versus Wingo -- Barker versus Wingo decision that the Court looks at the length of delay, the reasons for the delay, whether the defendant has asserted his or her rights to speedy trial, and found that the defendant has been prejudiced by the delay.
>
> It is the Court finds that it is not a 18 or more month delay based upon the several continuances that were caused by defense counsel.

In addition, the Court find, agrees with the People that basically it was no more than a 12 month delay from the time of warrant and arraignment and the time that he was violated. Given that the burden does not shift from the defendant to the prosecution.

In looking at the other, in looking at the reason for delay, the Court finds that the People did not have actual notice, and that some of that was attributed to the defendant.

In looking at whether the defendant asserted his or her rights to speedy trial, the Court finds that the defendant did knowingly waive his right; that he was familiar with the criminal justice system; that his letter shows that he knew about the speedy trial. And the fact that the People were not only given a day's notice of it, I think also weighs in the People's favor.

And in terms of looking at the reasons for the delay the Court also looked at the fact that the letter that I asked about was not dated or signed, it also indicates that the defendant knew about his rights; that he knowingly waived them at the time of trial. And therefore some support for that, defendant who agrees to trial date waives any claims that it does not come soon enough, and you can see People versus Jones, which is 192 Mich App 737.

I asked counsel to talk about any prejudice. And basically the defendant indicated that the prejudice was the delay in itself.

The Court has not found any reasonable basis to show how defendant has been prejudiced, whether it be the concurrent versus consecutive sentence or any problem in terms of finding or locating witnesses or preparing for defense.

And in fact the Court believes that delay has had -- the People suffer a prejudice in terms of presenting its case in terms or witness' memory since they have the burden, too, of proving the case.

So I don't believe that the parole violation in and of itself given the length of time and the length of the -- strike that.

I don't believe that the length of time in and of itself can be cured at sentencing.

Given all the factors in this case, the Court believes that the factor under Wingo did not justify a speedy trial constitutional violation. (MT 50-54). [October 3, 2003 motion hearing at pages 51-54]

1. LENGTH OF DELAY.

In People v Lowenstein, 118 Mich App 475; 325 NW2d 462 (1982), the Court stated that "[w]hile six months is necessary to trigger a further investigation, a delay of eighteen months or more shifts the burden to the prosecutor to prove that defendant has not been prejudiced. At that point, prejudice is presumed. People v Den Uyl, 320 Mich 477; 31 NW2d 699 (1948)." Lowenstein, 118 Mich App at 487. See also Collins, 388 Mich at 694; People v Hall, 391 Mich 175, 184; 215 NW2d 166 (1974). The United States Supreme Court has noted that most courts "have generally found postaccusation delays `presumptively prejudicial' at least as it approaches one year." Doggett v United States, 505 US 647, 652 n1; 112 S Ct 2686; 120 L Ed 2d 520 (1992). In the instant case, the length of delay was over eighteen months, shifting the burden to the prosecution to prove that Mr. Williams was not prejudiced.

The delay was in excess of nineteen months. According to the record, and undisputed by all parties, the robbery occurred on May 7, 2000. On May 23, 2000, Mr. Williams was placed in the custody of the Michigan Department of Corrections. On May 26, 2000, the prosecutor's office recommended a warrant for armed robbery. On June 2, 2000, the magistrate signed an arrest warrant. Over a year later, on June 28, 2001, a preliminary examination was conducted and Mr. Williams was bound over to circuit court. On July 19, 2001, Defendant was arraigned on the Information. Trial was scheduled to begin on January 9, 2002, the day Defendant brought the motion to dismiss. (Motion held January 9, 2002). The delay totaled over nineteen months.

The prosecutor acknowledged that the right to speedy trial begins at the time of arrest. (Brief in Support of Motion for Peremptory Reversal at page 10) Mr. Williams had been in the custody of the Department of Corrections since approximately May 23, 2000. A warrant issued in this case on June 2nd, 2000. A preliminary examination was not conducted until on or about

June 28th of 2001, wherein Mr. Williams was bound over for trial." The trial was scheduled for January 9, 2002. Certainly 18 months had transpired since June 2, 2000.

Defendant Williams asserts that the delay was longer than eighteen months, shifting the burden to the prosecution to prove that Mr. Williams was not prejudiced by the long delay.

REASON FOR DELAY.

In considering whether the reason for the delay justifies the deferment of trial, courts look to whether the delay is attributable to the defense or prosecution and whether the delay is justified by good cause. See People v Classen, 50 Mich App 122; 212 NW2d 783 (1973); Den Uyl, 320 Mich 477.

At the remand hearing, the trial court stated that "it is not a (sic) 18 or more month delay based upon the several continuances that were caused by defense counsel." (October 3, 2003 hearing at 52) However, Mr. Williams was not responsible for those delays.

At one point defense counsel was substituted, but there was nothing on the record indicating that it delayed trial or that any delay that might have been caused was attributable to Defendant. According to Mr. Williams at the final pretrial conference, and no one contradicted him, the court "fired" the attorney "because the lawyer didn't show up." (Final Conference held October 12, 2001 at 4). Any conferences that were cancelled were cancelled because Mr. Williams attorney failed to show up and such delays should not be attributed to Mr. Williams.

The initial trial judge could find no reason for the lengthy delay. He observed:

> No efforts that I know of were made to do anything beyond obtaining a warrant until on or about June 19th of 2001 when Mr. Williams was arraigned on the warrant. Then he had a preliminary examination on June 28th, 2001. As I view the matter, at least at the time of the preliminary examination, some questions should have been raised as to whether or not there was a violation of his right to a speedy trial at that time. That was more than a year after the warrant issued. And his whereabouts were or should have been known to the Prosecution.

> He's in prison. He's not hiding on the street somewhere, in another state, as an absconder or out of the country. He's right here in the custody of the State. What excuse is there for not bringing this matter to fruition at an earlier date? What efforts have been made to do so? (Motion held January 9, 2002 at 11-12).

At one point the prosecutor agreed with Judge Crockett that the lengthy delay was "inexcusable." (Id. at 19). Additionally, the trial court's statement at the remand hearing that "it was no more than a 12 month delay from the time of warrant and arraignment and the time that he was violated" is nonsensical. The issue is the period of time between arrest and trial. Also, the trial court's reference to the letter which Mr. Williams had sent to the previous trial judge as undated cannot be the basis of the trial court's ruling because the trial court made no further findings beyond this bare statement. In fact, the letter demonstrates that Mr. Williams was making every effort to give notice that his constitutional rights were being violated.

In the instant case, the delay in bringing Mr. Williams to a speedy trial was in excess if 1 ½ years and none of the delay was attributable to him. This factor militates in favor of Defendant.

2. DEFENDANT'S ASSERTION OF HIS RIGHT TO A SPEEDY TRIAL.

Defendant Williams asserted his right to a speedy trial. On January 8, 2002, Mr. Williams filed a Motion To Dismiss For Violation Of Defendant's Constitutional Right To Speedy Trial, Or In The Alternative, For Lack Of Jurisdiction Based On A Violation Of The 180 Day Rule Pursuant To MCR 6.004. On January 9, 2002, a Motion Hearing was held where Judge Crockett granted the motion and dismissed the charges. (See Motion held January 9, 2002 at 21-23; Order of January 9, 2002). Also, during an August 10, 2001 Calendar Conference defense counsel put on the record that Mr. Williams "would like to put the People on notice as well as the Court that I would like to file a 180 Day Rule motion. I will do that in accordance

with the Court Rules and present that on a timely basis to the prosecution and have discovery, and I don't know if you want to set that now in anticipation of that or just wait until I present the motion." The court responded that "it's generally on the basis of written documents, Counsel." (Calendar Conference held August 10, 2001 at 3).

Also, Mr. Williams advised previous appellate counsel that he wrote Judge Crockett a letter approximately three weeks prior to the January 9th motion hearing addressing the speedy trial issue. In the letter he reminded the court that a verbal motion had been made during the August 10, 2001 hearing, but that his then assigned attorney "failed to represent Defendant on said motion and the case as a whole, resulting in the motion not being heard at all." Mr. Williams wrote: "Again Your Honor, My plea is that if my motion had been heard and I'm asking that it be heard and yes, it is on record (verbally) and in lew [sic] of all the months (18) the law states that 'Jurisdiction has been lost.'" (See Letter Attached as Appendix A). The trial court on remand only made one finding with regard to this letter: that the letter was undated and unsigned. The letter was part of the lower court file.

Failure to assert this right does not amount to a waiver of it; rather, it is only one factor to be considered in the balancing process. Grimmett, 388 Mich at 604. But given the fact that there was an assertion of the right and the delay between Mr. Williams' arrest and trial was in excess of nineteen months, this factor also favors Defendant.

3. PREJUDICE TO DEFENDANT.

The more than nineteen-month delay in Mr. Williams' case was sufficiently long to cause prejudice. Both the Michigan Supreme Court and the United States Supreme Court have recognized that the gravest injustice a defendant may suffer from a lengthy pretrial delay is prejudice to his defense. See Grimmett, 388 Mich at 606; Collins, 388 Mich 680; Barker, 407

US at 532. In Barker, the Court identified three general interests that the speedy trial was designed to protect: prevent oppressive pretrial incarceration, minimize the accused's anxiety, and limit impairment of presenting a defense. Id. at 532.

At the remand hearing the trial court held in this regard:

> I asked counsel to talk about any prejudice. And basically the defendant indicated that the prejudice was the delay in itself.
>
> The Court has not found any reasonable basis to show how defendant has been prejudiced, whether it be the concurrent versus consecutive sentence or any problem in terms of finding or locating witnesses or preparing for defense.
>
> And in fact the Court believes that delay has had -- the People suffer a prejudice in terms of presenting its case in terms or witness' memory since they have the burden, too, of proving the case.[October 3, 2003 hearing at 53]

While the possibility that the defense will be impaired is the most serious of the three interests, it is not outcome-determinative in the speedy trial analysis. An affirmative demonstration of prejudice is not even necessary to prove a denial of one's constitutional right to a speedy trial. See Lowenstein, 118 Mich App at 489. But there is always the potential for unreliability of witnesses' recollection attendant on a lengthy delay as in the instant case. This Court in Lowenstein stated the rule that a lesser showing of prejudice will suffice where the other factors weigh in favor of the defendant's position. See Id. at 490. When balancing the four factors the relative weight of the factors does not require an even distribution of weight or any particular formula at all. Instead, the important question is whether the prosecution adhered to its constitutional duty to provide a speedy trial or adequately explained why it did not. See Barker, 407 US at 514.

In addition, Mr. Williams' lengthy incarceration increased his anxiety where he spent more than 1 ½ years incarcerated waiting for trial. And during the first full year, from the time

of his arrest on May 23, 2000 until his preliminary examination on June 28, 2001, Mr. Williams simply sat without anything happening in his case. It took over a year to hold a preliminary examination. And then it took over six more months to begin trial. There was absolutely no good faith effort on the part of the prosecution to bring Mr. Williams to a speedy trial. Although the initial order granting Defendant's motion was vacated by the Court of Appeals, the trial court at that time acknowledged the long delays where absolutely nothing occurred.

> No efforts that I know of were made to do anything beyond obtaining a warrant until on or about June 19th of 2001 when Mr. Williams was arraigned on the warrant. Then he had a preliminary examination on June 28th, 2001. . . . That was more than a year after the warrant issued. And his whereabouts were or should have been known to the Prosecution. He's in prison. . . . What excuse is there for not bringing this matter to fruition at an earlier date? What efforts have been made to do so? (Motion held January 9, 2002 at 11-12).

Contrary to the trial court's finding that Mr. Williams was not prejudiced, prejudice is demonstrated by the fact that Mr. Williams was on parole at the time of his arrest. Therefore, all of the period of incarceration prior to what would have been his sentencing is "dead time." That is to say, he would receive no credit for the time served prior to sentencing. The Department of Corrections would merely add that time to his previously calculated release date on the offense for which he had already been paroled. In fact at the hearing on remand the trial court appears to agree with Mr. Williams and states: "I don't believe that the length of time in and of itself can be cured at sentencing." (October 3, hearing at 54).

Mr. Williams suffered through a lengthy and personally prejudicial incarceration, all of which was "dead time," and at times as much as a year would pass when literally nothing occurred in his case. The delays were for reasons not shown to be chargeable to the defense, utterly unjustifiable, and without a showing of good faith. There is no indication in the record that the delay in prosecuting Mr. Williams arose through some justifiable reason or necessity

linked to the requirement that he receive a fair trial. The prosecution allowed Mr. Williams to languish in custody without justification or a showing of good faith.

Although an affirmative demonstration of prejudice is not required to prove denial of the right to a speedy trial, the more than nineteen-month delay in this case provides ample potential for prejudice. Combined with the oppressive pretrial incarceration and the anxiety it provoked in this case, the injustice to Mr. Williams is manifest.

If it is determined by this Court that the length of delay did not shift the burden to the prosecutor in this case, or if the prosecution has somehow indicated a lack of prejudice to Mr. Williams, it is apparent that when the four factors articulated in Barker and Grimmet are applied to the instant case, that Mr. Williams' constitutional right to a speedy trial was violated. Not one of the factors militates toward the prosecution.

Balancing the four factors, the prosecution clearly violated its constitutional duty to provide Mr. Williams with a speedy trial. The central question is whether the state discharged its constitutional duty to make a diligent, good faith effort to bring Mr. Williams to trial. See Moore v Arizona, 414 US at 26; Smith v Hooey, 393 US 374, 383; 89 S Ct 575; 26 L Ed 2d 607 (1969). Both the United States Supreme Court and the Michigan Supreme Court require a court to assess, identify, and balance the four factors. No single factor is either a necessary or a sufficient condition.

All four Barker factors weigh in Mr. Williams' favor. No attempt to balance these factors can avoid the conclusion that in sum they weigh heavily against the prosecution. The more than nineteen-month delay was unreasonable, unnecessary, and "unjustifiable." The prosecution had no explanation for the lengthy and oppressive delay. There was absolutely no good faith effort shown, or argued, why Mr. Williams was not brought to trial for over 1 ½ years.

The length of the delay was prejudicial. The prosecution failed to fulfill its constitutional duty to provide Mr. Williams with a speedy trial.

For all the foregoing reasons, the trial court's decision to deny Defendant's speedy trial motion was in error. This Court should reverse the trial court's order and order that the case be remanded to the trial court for dismissal of the charge.

D. DEFENDANT WILLIAMS DID NOT WAIVE HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL BY SIMPLY AGREEING AT THE FINAL CONFERENCE TO THE DATE SET FOR TRIAL.

At the remand hearing the trial court held that Mr. Williams had waived his right to a speedy trial and stated:

> And in terms of looking at the reasons for the delay the Court also looked at the fact that the letter that I asked about was not dated or signed, it also indicates that the defendant knew about his rights; that he knowingly waived them at the time of trial. And therefore some support for that, defendant who agrees to trial date waives any claims that it does not come soon enough, and you can see People versus Jones, which is 192 Mich App 737. [October 3, 2003 hearing at 53]

The trial court is referring to the Final Conference held on October 12, 2001, more than fifteen months after Mr. Williams was placed in the custody of the Department of Corrections, when the court set a trial date. After stating that Defendant had "to be tried within 180 days of approximately June 19th," the court and the clerk held a conference off the record and the court stated that the "earliest date we can give you is January 9." Defendant responded: "I can accept that, your Honor." Both defense counsel and the prosecutor responded that it was "fine." (Final Conference held October 12, 2001 at 5).

By simply agreeing to a trial date set by the court, Defendant did not waive his constitutional right to a speedy trial. Waiver of a fundamental constitutional right must be knowing, voluntary, and intelligent.

Both the United States Constitution and the Michigan Constitution guarantee to the accused the right to a speedy and public trial by an impartial jury. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." US Const, Ams, VI and XIV. "In every criminal prosecution, the accused shall have the right to a speedy and public trial . . . ." Const 1963, art 1, §20. A speedy trial by jury is a fundamental constitutional right in the American scheme of justice. Duncan v Louisiana, 391 US 145, 149; 88 S Ct 1444; 20 L Ed 2d 491 (1984). The United States Supreme Court has noted that the right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment." Klopfer v North Carolina, 386 US 213; 87 S Ct 988; 18 L Ed 2d 1 (1967).

In the context of the right to a jury trial, Johnson v Zerbst, 304 US 458; 68 S Ct 1019; 82 L Ed 1461 (1938), held that because the waiver of the right to trial by jury must be intelligently and understandingly made, courts must "indulge every reasonable presumption against waiver." Id. at 464. The Sixth Circuit has cautioned that "the public interest in jury trials is so great that defendants cannot waive their right to trial by jury except under certain conditions." United States v Martin, 704 F2d 267, 271 (CA, 6).

In the same context, the Sixth Circuit set forth the conditions that must be satisfied for a waiver to be effective:

> First, the waiver must be in writing. Second, the government attorney must consent to the waiver. Third, the trial court must approve the waiver. Fourth, the defendant's waiver must be voluntary, knowing and intelligent. United States v Martin, 704 F2d 267, 271 (CA, 6) citing Patton v United States, 281 US 276, 298 (1930).

Where the United States Supreme Court has stated that the right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment," Klopfer v North Carolina, 386 US 213; 87 S Ct 988; 18 L Ed 2d 1 (1967), the same conditions required for waiver of the

fundamental right to a jury trial surely apply to the waiver of the fundamental right to a speedy trial.

The trial court relied upon the case of People v Jones, 192 Mich App 737, after remand 197 Mich App 76 (1992) in holding that Mr. Williams had waived his right to a speedy trial. In Jones, the Court of Appeals did state that conduct inconsistent with the Interstate Agreement on Detainers will be viewed as establishing a waiver of statutory rights. But that case relied on federal *statutory* law. In the instant case, the right to a speedy trial is a fundamental right guaranteed by the Constitution. That case, and all others cited by the prosecution to support its waiver argument, is inapposite and does not control this case.

Additionally, the trial court referenced Mr. Williams letter asserting his desire to have his motion to dismiss heard by the Court as evidence that Mr. Williams made an intelligent waiver. Defendant did not waive his speedy-trial objection where the record does not establish that he made an affirmative waiver of the right. Waiver cannot be presumed from a silent record. People v Farmer, 127 Mich App 472, 476; 339 NW2d 218 (1983); Johnson v Zerbst, 304 US 458, 465; 56 S Ct 1019; 82 L Ed 1461 (1937).

It cannot be said that Mr. Williams knowingly, voluntarily, and intelligently waived any speedy-trial objection. There is absolutely nothing on the record relied upon by the prosecutor pointing to a valid waiver. The record is silent regarding waiver. Waiver was not even discussed. Mr. Williams simply agreed to a standard court room procedure of setting a trial date. Mr. Williams did not waive his rights. The trial court did not err when it granted Defendant's motion to dismiss due to a violation of his right to a speedy trial. Consequently, this Court should reverse the trial court's denial of Mr. Williams motion and remand to the trial court for dismissal of the charges.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellee asks that this Honorable Court grant the relief requested.

STATE APPELLATE DEFENDER OFFICE

BY: _____

LEONARD ZIELINSKI (P58155)
Assistant Defender
101 North Washington
14th Floor
Lansing, MI 48913
(517) 334-6069

Date: September 3, 2004

APPENDIX A

Cleveland Waye Williams #215861
G. Robert Cotton Correctional Facility
3510 N. Elm Street
Jackson, Michigan 49201-8877

George W. Crockett III
Frank Murphy Hall of Justice
1441 St. Antoine Rm. 402
Detroit, MI. 48226

RE: Cleveland Wayne Williams
Case No. 01-7419

In reference People v Hill (180 day rule) Speedy Trial.

Your Honor,

On August 10, 2001 a motion under M.C.L.A. 780.131 was filed on behalf of Cleveland Wayne Williams case number 01-7419 having Carl Banks as the assigned defense attorney. The motion was to surface the details of the motion that applied to Defendant using People v Hill Mich 262 NW2d 641, 402 272 (please refer to) 1978

As we recolect, attorney Banks failed to represent Defendant on said motion and the case as a whole, resulting in the motion not being heard at all. The honorable Court in return assigned attorney Munsey G. Wilson to my case as a result of Att. Banks constant absence in which if it had been heard, it would have shown that under Michigan Court Rule 6.004 'Speed Trial' The prosecution fail to bring this case to trial and/or show a good faith effort in doing so.

Fact No.1
The prosecution ignored the notice of the Department of Corrections of a complaint and or information of a complaint against an inmate as described in People v Hill,

Fact No.2
Having knowledge that at the time to present day I have been a prisoner and failing to even have me arraigned on the charge until just this past June 21, 2001 when the alleged crime took place May 7, 2000 and my parole violation hearing on the charge took place June 2000 at which time the Department of Corrections notified Micheal Duggan's office of the untried warrent which is in compliance to MCLA 780.131

Again Your Honor, My plea is that if my motion had been heard and I'm asking that it be heard and yes, it is on record (verbally) and in law of all the months (18) the law states that 'Jurisdiction has been lost.'

MCLA — 750.530

I am only asking this Honorable Court to look into this matter as all the material facts are a matter of record by the Department of Corrections under Cleveland Wayne Williams #215861 or looking into the date of the original warrent as no one has done, and I have tried to no avail. I appeal to this Honorable Court because this matter is before Your Honor. I trust and understand that your fair and impartial to those that come before you. I will respect and honor your decision as a result of looking into these facts wheather in my favor or not. I eagerly await your response.

Respectfully,

Dated

[NOTARY]

Dated

Cleveland Wane Williams #215861

[NOTARY]

Dated

Cleveland Wane Williams #215861

[NOTARY]

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
-v-
CLEVELAND WAYNE WILLIAMS,
Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 239662

Circuit Court No. 01-7419-01

NOTICE OF HEARING

TO: WAYNE COUNTY PROSECUTOR

PLEASE TAKE NOTICE that on September 28, 2004, the undersigned will move this Honorable Court to grant the within Application for Leave to Appeal.

STATE APPELLATE DEFENDER OFFICE

BY: _____
LEONARD ZIELINSKI (P58155)

Date: September 3, 2004

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF INGHAM)

Jean M. Downey, being first sworn, says that on September 3, 2004, she mailed one copy of the following: NOTICE OF HEARING/PROOF OF SERVICE and APPLICATION FOR LEAVE TO APPEAL to:

Wayne County Prosecutor
Appellate Division
1100 Frank Murphy Hall of Justice
1441 St Antoine
Detroit, MI 48226

Clerk, Court of Appeals
Suite 14-300
3020 West Grand Boulevard
Detroit, MI 48202

Clerk, Wayne County Circuit Court
Criminal Division
Frank Murphy Hall of Justice
1441 St Antoine
Detroit, MI 48226

_____
Jean M. Downey

Subscribed and sworn to before me
September 3, 2004.

_____
Leonard Zielinski, Notary Public
Grand Traverse acting in Ingham County, Michigan
My commission expires: 7/29/2007
IDEN NO. 19121PROS / Leonard Zielinski

State Appellate Defender
Lansing Office
www.sado.org

James R. Neuhard
Director

Norris J. Thomas, Jr.
Chief Deputy Director

Detroit Office
Suite 3300 Penobscot Building
645 Griswold Street
Detroit, Michigan 48226-4281
Phone 313.256.9833 • Fax 313.965.0372

Dawn Van Hoek
Deputy Director
Director Lansing Office
& Criminal Defense Resource Center

Lansing Office
101 North Washington
14th Floor
Lansing, Michigan 48913-0001
Phone 517.334.6069 • Fax 517.334.6987

September 3, 2004

Clerk
Michigan Supreme Court
925 West Ottawa, 4th Floor
P. O. Box 30052
Lansing, MI 48913

Re: People v Cleveland Wayne Williams
Supreme Court No.
Court of Appeals No. 239662
Circuit Court No. 01-7419-01

Dear Clerk:

Enclosed please find the original and seven (7) copies of Notice of Hearing/Proof of Service and Application for Leave to Appeal for filing in your Court.

Thank you for your cooperation.

Sincerely,

Leonard Zielinski
Assistant Defender

LJZ.jd

Enclosures

cc: Wayne County Prosecutor
Court of Appeals Clerk (Detroit)
Wayne County Circuit Court Clerk
Cleveland Wayne Williams